Is an interim measure of protection ordered by an arbitral tribunal an arbitral award?

I Introduction

Within the range of questions surrounding the concept of an arbitral award, one of the most hotly disputed issues is whether an interim measure of protection ordered by an arbitral tribunal[1] is (or can be) an arbitral award. This is a question which has received almost every conceivable answer. In the next section (Section II), these various answers – and some of the authorities supporting them – are considered. The third part (Section III) examines the varied ways in which commentators have approached the question and considers reasons for the lack of academic consensus. Having shown in Sections II and III that there is no uniquely 'correct' answer to the question posed by the title of this article, the discussion turns in the final part (Section IV) to the question whether interim measures should be awards. The conclusion is that the policy objective of making interim measures enforceable can be better attained by the adoption of the solution advanced by the 2006 amendments to the UNCITRAL Model Law on International Commercial Arbitration, rather than by treating interim measures as awards. The advantage of the Model Law's solution is that it avoids the negative consequences, in terms of exposure to the risk of annulment, that flow from classifying interim measures as awards.

[1] Although an interim measure of protection may either be ordered by an arbitral tribunal or granted by a national court, in the discussion which follows the phrases 'interim measure' and 'interim measure of protection' signify such a measure ordered by an arbitral tribunal. In recent years, a number of arbitral institutions have incorporated the concept of the 'emergency arbitrator' into their institutional rules: see, eg, ICC Arbitration Rules, art 29 and appendix V; LCIA Arbitration Rules, art 9B; SIAC Arbitration Rules, r 26(2) and schedule 1. The purpose of such provisions is to enable an arbitral body to order interim measures of protection prior to the appointment of the arbitral tribunal, thereby obviating (or, at least, reducing) the need for parties to seek interim measures from national courts. This article does not address the status of interim measures ordered by emergency arbitrators. For discussion of this issue, see Marchisio, *The Notion of Award in International Commercial Arbitration: A Comparative Analysis of French Law, English Law, and the UNCITRAL Model Law* (2017) ch 7.

The leading French commentators on international arbitration have observed that '[t]he concept of the arbitral award has been the subject of considerable debate.'[2] This is a debate that has yet to reach a satisfactory conclusion. The absence of a conclusive definition of an arbitral award is striking given that the ultimate objective of an arbitration is the rendering by the tribunal of a decision in the form of an award which definitively determines the parties' dispute(s). Neither the New York Convention of 1958 on the recognition and enforcement of arbitral awards ('NYC') nor the UNCITRAL Model Law on International Commercial Arbitration ('Model Law') includes an explicit definition. During the deliberations leading to the adoption of the Model Law in 1985, the Working Group agreed that it would be desirable for the Model Law to define the term 'award'.[3] However, the Working Group decided, for lack of time, not to include such a definition in the text of the Model Law and, more than a quarter of a century later, the 2006 revisions did not address the question. The lack of an agreed definition at the international level is symptomatic of profound disagreements both conceptually and in terms of policy.

Over the course of an arbitration, a tribunal may have to decide a wide range of procedural, jurisdictional and substantive issues. At one end of the spectrum, a case-management decision by the tribunal fixing the date on which an oral hearing is to take place is not an award. Although some commentators take a very broad view of what constitutes an award, there is no mainstream view according to which day-to-day case-management decisions qualify as awards. Conversely, at the other end of the spectrum, there can be no doubt that a final decision which disposes of all outstanding matters submitted to the arbitral tribunal,

[2] Savage & Gaillard (eds), *Fouchard, Gaillard & Goldman on International Commercial Arbitration* (1999) para 1348.
[3] UNCITRAL, *Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration* (1985) UN Doc A/CN.9/264: Art 34, para 3 (available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/V85/244/18/PDF/V8524418.pdf?OpenElement).

thereby rendering the tribunal *functus officio*, is an award.[4] Between these two extreme points, a line has to be drawn dividing those decisions which are (or may be) awards from those which are not. On which side of the line do interim measures of protection fall?

Some arbitration instruments indicate (either expressly or implicitly) that 'awards' are to be distinguished from other decisions of the arbitral tribunal. For example, under the English Arbitration Act 1996, section 20(3) refers to arbitral determinations as 'decisions', 'orders' or 'awards' – although none of these terms is defined. There are also sets of institutional arbitration rules which allude to the fact that arbitrators make different types of determination: article 35(1) of the SCC Arbitration Rules, for example, refers to the tribunal making 'an award or other decision'; article 28 of the CIETAC Arbitration Rules recognises 'decisions, rulings or the award'. However, again, no definition of any of these terms is suggested.

The problem is exacerbated by the fact that, within national arbitration legislation and sets of arbitration rules, not only are terms like 'decision', 'ruling', 'order' and 'award' normally not defined, but also there is inconsistency in the use of a whole range of qualifying adjectives. Awards and other decisions may be qualified by terms such as 'final', 'partial', 'interim', 'interlocutory' or 'provisional'. These adjectives are sometimes used in rather haphazard ways and there seems to be no conventional understanding of their significance, despite efforts by commentators to promote greater terminological rigour.[5]

[4] Born, *International Arbitration: Law and Practice* (2nd edn, 2015) ch 15, para 12.
[5] See, eg, Peters & Koller, 'The Notion of Arbitral Award: An Attempt to Overcome a Babylonian Confusion' [2010] Austrian Yearbook on International Arbitration 137.

Against this background, arbitral tribunals may be equally lax in their use of vocabulary.[6] If, for example, an arbitral tribunal refers to one of its decisions as an 'interim award',[7] what is that label intended to signify? Is it (i) that the decision is not final and that the matters covered by the decision may be revisited by the tribunal in a later decision or (ii) that the decision resolves only some of the claims or issues raised in the arbitration, leaving other questions to be resolved in later decisions or (iii) that the decision is a final one on the ordering of interim relief or (iv) something else? Terminological uncertainty means that it is not easy to nail down exactly what types of arbitral decision are awards, or capable of being awards, and which are not.

Within this environment, the correct characterisation of interim measures of protection is controversial. On the one hand, an interim measure may conceptually be contrasted with an arbitral tribunal's award on the merits of the dispute referred to arbitration. According to article 17(2) of the Model Law an interim measure is a '*temporary* measure', which is ordered by the tribunal before the parties' dispute is resolved by the final award; such measures may, *inter alia*, order a party (a) to maintain the status quo pending the final determination of the dispute, or (b) to take action that would prevent harm to the arbitral process itself, or (c) to provide a means of preserving assets out of which a subsequent award may be satisfied, or (d) to preserve evidence that may be relevant to the resolution of the dispute. The arbitral tribunal may, for example, make an anti-suit order, restraining one of the parties from pursuing court proceedings in breach of the terms of the parties' arbitration agreement or, pending a decision on the merits, order a party not to take steps that would

[6] Gunter, 'Enforcement of arbitral awards, injunctions and orders' [1999] Alternative Dispute Resolution Law Journal 265, 266.
[7] The phrase 'interim award' has been described as 'a confusing term, and in its most common use, arguably a misnomer': Departmental Advisory Committee on Arbitration Law, *Report on the Arbitration Bill* (1996) para 223.

aggravate the dispute or require the respondent to provide security for some or all of the claims advanced by the claimant.

On the other hand, interim measures play a very significant role in ensuring that the arbitral process is effective, that a claimant which has a valid claim can obtain an award in its favour and that any award on the merits is not a *brutum fulmen*. Indeed, it has been observed that 'an arbitration may be an exercise in futility if interim relief cannot be obtained rapidly.'[8] In certain types of case, the issuing of appropriate interim measures, such as an order for the preservation of evidence, may, in practical terms, be 'no less important to the parties' rights … than a monetary award.'[9]

The practical importance of interim measures of protection has provided the backdrop to the debate over whether interim measures are (or can be) arbitral awards. There are two important contexts in which the question whether an interim measure is an award may require an answer. First, a party which has obtained an interim measure in its favour may seek to have the measure enforced in a non-seat country in accordance with the provisions of the NYC. In this situation, the NYC can be relied on only if the interim measure is an award. A significant part of the impetus for the argument in favour of classifying interim measures as awards is the policy objective of making such measures enforceable, both domestically and internationally under the NYC. Secondly, if a party to an arbitration applies to the courts of the seat to have an interim measure set aside, the application is admissible only if the interim measure in question is an award. Whether the benefits of enforceability can be achieved

[8] Schwartz & Derains, *Guide to the ICC Rules of Arbitration* (2nd edn, 2005) p 294. See also Lew, Mistelis & Kröll. *Comparative International Commercial Arbitration* (2003) para 23-1 ('The relief sought in the principal action is frequently insufficient to protect effectively the rights or interest of the alleged innocent party.').
[9] Born, *International Commercial Arbitration* (2nd edn, 2014) p 2934.

without also exposing interim measures to the risk of being set aside is considered in Section IV.

II Different potential solutions

There are three views on the proper legal characterisation of interim measures of protection: (i) such measures are not awards; (ii) such measures are awards; (iii) such measures can be awards. As will be seen, although significant arguments can be marshalled to support each of these views, each one also has to face up to powerful counter-arguments.

(1) An interim measure of protection is not an award

Although, as will be seen, the relevant legal materials are contradictory and impossible to reconcile, it is clear that the majority of them do not support the view that interim measures of protection are or can be awards,. There are two main points to consider.

First, although the legislation of most legal systems does not attempt to define the term 'award', most legal systems that do offer an explicit definition tend to adopt a narrow view which excludes interim measures of protection. For example, section 2(1) of the International Arbitration Act (Singapore) defines an 'award' as 'a decision of the arbitral tribunal on the substance of the dispute' and, while it goes on to say that this includes 'any interim, interlocutory or partial award' (terms which are not defined), it expressly excludes 'orders or directions made under section 12', a provision which confers on the arbitral tribunal the power to order interim measures of protection.[10]

[10] Similar definitions are also to be found in the legislation of other countries, including British Columbia, Malaysia and New Zealand.

Secondly, in terms of the decided cases, there are some well-known authorities rejecting the notion that an interim measure is a type of arbitral award. Perhaps the most widely cited case is the decision of the Queensland courts in *Resort Condominiums International Inc v Bolwell*.[11] The claimant applied to enforce in Queensland a decision rendered in the context of an arbitration seated in Indiana. The decision, which the tribunal had titled 'Interim Arbitration Order and Award', ordered the respondent, *inter alia*, to discontinue certain activities and to provide various records, reports and accounts relating to the respondent's business. As Lee J pointed out, the orders contained in the decision were:

> of an interlocutory and procedural nature and in no way purport[ed] to finally resolve the disputes or any of them referred by [the claimant] for decision or to finally resolve the legal rights of the parties. They [were] provisional only and liable to be rescinded, suspended, varied, or reopened by the tribunal which pronounced them.[12]

The main question facing the judge was whether the 'Interim Arbitration Order and Award' constituted an award for the purposes of the Australian legislation implementing the NYC. Although Lee J's judgment is not always easy to follow and there are elements of the decision which are clearly heterodox,[13] the judge decided *inter alia* that to be an award an arbitral decision must be final and that, as a consequence, the 'Interim Arbitration Order and Award' was not an award.

[11] [1995] 1 Qd R 406. Excerpts also reported at (1995) XX YB Comm Arb 628. Despite the fact that the decision is more than twenty years old, it is cited as a relevant authority by Gaillard & Bermann, the authors of *UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (2016) (available at: http://newyorkconvention1958.org/pdf/guide/2016_Guide_on_the_NY_Convention.pdf).
[12] (1995) XX Yearbook Comm Arb 628 at [1].
[13] For example, the judge's view that the court retains a general discretion to refuse enforcement on grounds other than those set out in art V NYC ((1995) XX Yearbook Comm Arb 628 at [45]) cannot be supported.

There are also similar judgments from other jurisdictions. For example, according to the Tunisian courts, a decision ordering interim measures of protection is not an award for the purposes of article 34 of the Model Law, and consequently an application to set aside such a decision is not admissible.[14]

(2) An interim measure of protection is an award

The arbitration legislation of some countries takes a sufficiently expansive approach to the concept of an award to encompass procedural decisions, including interim measures. For example, the section 2(1) of the Zambian Arbitration Act 2000 defines an 'award' as 'the decision of an arbitral tribunal on the substance of a dispute and includes any interim, interlocutory or partial award *and on any procedural* or substantive *issue*'.[15] Moreover, in contrast to the decision in the *Resort Condominiums* case, there is line of decisions of the US courts holding that certain interim measures are awards.[16] In *Pacific Reinsurance Management Corporation v Ohio Reinsurance Corporation*,[17] for example, the Court of Appeals for the Ninth Circuit accepted that an Interim Final Order – which was in the nature of an interim injunction – was an interim award which was capable of being confirmed (or vacated) by the court under the Federal Arbitration Act 1925. Although in the form of a temporary injunction, the order was 'a confirmable, *final* award[...] on an issue distinct from the controversy on the merits.'[18] On this basis, 'a temporary equitable award has an element of finality sufficient to be confirmed or enforced under the FAA.'[19]

[14] See UNCITRAL, *2012 Digest* of *Case Law on the Model Law on International Commercial Arbitration* (2012) p 137, para 16 (available at: http://www.uncitral.org/pdf/english/clout/MAL-digest-2012-e.pdf).
[15] Emphasis added.
[16] See *Sperry International Trade v Government of Israel,* 689 F 2d 301 (2d Cir, 1982) *Southern Seas Navigation Ltd of Monrovia v Petroleos Mexicanos of Mexico City*, 606 F Supp 692 (SDNY, 1985); *Pacific Reinsurance Management Corporation v Ohio Reinsurance Corporation*, 935 F 2d 1019 (9th Cir, 1991); *Yasuda Fire & Marine Insurance Co of Europe v Continental Casualty Co*, 37 F 3d 345 (7th Cir, 1994).
[17] 935 F 2d 1019 (9th Cir, 1991).
[18] At 1023.
[19] *Idem*.

In doctrinal terms, the approach of the court in the *Pacific Reinsurance Management Corporation* case hits up against two problems. First, it involves accepting a less stringent view of finality than the one that is most commonly adopted by the courts of other countries. Secondly, even if the question of finality is put to one side, an interim measure of protection is not a decision that resolves in whole or in part the dispute referred to arbitration. Arguably, the mere fact that the decision addresses a point about which the parties were in disagreement (ie, whether or not the measure in question should be ordered by the tribunal) is not enough for the decision to be an award. If the touchstone of an award were that it decides something on which the parties to the arbitration were not in agreement, almost every arbitral decision – including purely procedural rulings and day-to-day case management determinations – could qualify as awards; such an approach would spread the net far too wide and cannot be supported.

The orthodox view is that an award is a decision which deals with a difference that had been referred to arbitration. In the *Resort Condominiums* case,[20] Lee J thought that such a conclusion is implicit in provisions such as article II(1) NYC which refers to arbitration agreements as agreements 'under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them' and article V(1)(c) NYC which provides that one of the grounds on which an award may be refused recognition and enforcement is that the award 'deals with a difference not contemplated by or not falling within the terms of the submission to arbitration'. Although the parties to an arbitration may well disagree about whether arbitrators have the power to order particular interim measures and, if so, whether they should exercise that power, this disagreement is not obviously a

[20] *Resort Condominiums International Inc v Bolwell* (1995) XX Yearbook Comm Arb 628 at [19].

'difference' which the parties, by their arbitration agreement, undertook to submit to arbitration: 'the parties did not agree to arbitration in order to resolve issues of arbitral procedure.'[21]

(3) An interim measure of protection can be an award

The intermediate position is the idea that, although an interim measure is not *necessarily* an award, such a measure *can be* an award. While this position might appear to be counter-intuitive, it derives support from some arbitration legislation (in particular, the Model Law) and institutional arbitration rules. As will be seen, there are examples of both types of instrument providing that an interim measure may be issued *either* in the form of an award *or* in another form.

While national legislation generally does not explicitly address the relationship between awards, on the one hand, and interim measures of protection, on the other, the way in which legislative provisions are drafted gives an indication of what this relationship might be. For example, the 2006 version of the Model Law contains articles dealing with two sorts of provisional measure: interim measures (articles 17 and 17A) and preliminary orders (article 17B and 17C). A preliminary order is, in effect, an *ex parte* (without notice) interim measure. Article 17A states that an 'interim measure is any temporary measure, whether in the form of an award or in another form',[22] whereas article 17C(5) expressly provides that a preliminary order 'does not constitute an award'. Some institutional and other sets of arbitration rules follow the same pattern as article 17A of the Model Law; it is not uncommon for arbitration rules to state that an interim measure may take the form of an order or of an award. For

[21] *ICCA's Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges* (2011) p 18.
[22] Not all national legislation implementing the Model Law follows this wording. For example, section 1041 of the German Code of Civil Procedure makes no mention of the form that an arbitral decision ordering interim measures should take.

example, article 28(1) of the ICC Arbitration Rules provides that 'the arbitral tribunal may … order any interim or conservatory measure it deems appropriate. … Any such measure shall take the form of an order, giving reasons, or of an award, as the arbitral tribunal considers appropriate.'[23]

At first blush, it might seem reasonable to conclude that, for the purposes of provisions such as article 17A of the Model Law and article 28(1) of the ICC Arbitration Rules, an interim measure of protection, if rendered in the form of an award, constitutes an award. There are, however, those who argue that such provisions simply give arbitral tribunals a choice in terms of *form*, while emphasising that an interim measure should include reasons for the decision. According to this view, article 17A of the Model Law does not mean that an interim measure of protection which is issued in the form of an award takes effect as an award.[24] As one commentator notes: 'The very words "in the form" suggest that [an interim measure] is in fact not an award but only complying in form.'[25]

But, how convincing is this interpretation? In the context of the Model Law, the idea that an interim measure of protection is not an award – even if the tribunal adopts the form of an award – is hard to square with the fact that article 17C(5) explicitly states that a provisional order does not constitute an award. The existence of this provision implicitly suggests that,

[23] See also art 23(3) of the HKIAC Administered Arbitration Rules; art 26(1) of the SIAC Arbitration Rules; art 32(3) of the Stockholm Chamber of Commerce Arbitration Rules. By contrast, whereas art 26(2) of the 1998 version of the UNCITRAL Arbitration Rules provided that interim measures 'may be established in the form of an interim award', there is no equivalent provision in the 2010 version, which avoids the conceptually uncertain phrase 'interim award' altogether.

[24] Menon & Chao, 'Reforming the Model Law Provisions on Interim Measures of Protection' (2006) 2 Asian International Arbitration Journal 1, 7 ('The tribunal may, if it chooses, order a temporary measure in the form of an award but it is not obliged to. This has little significance in relation to such issues as enforcement and recourse against the measure because what constitutes an award is generally a question of substance than of form and, in any case, a temporary measure by its very nature is unlikely to be an award.').

[25] Boo, 'Ruling on Arbitral Jurisdiction – Is that an Award?' (2007) 3 Asian International Arbitration Journal 125, 126 n 6.

unlike a provisional order, an interim measure can be an award. When articles 17A and 17C are read together, the natural inference is that an interim measure will be an award if rendered in the appropriate form.

Having said that, the position under the Model Law is far from clear. In contrast to articles 17A and 17C, there are other provisions of the Model Law which imply that interim measures are not awards. The 2006 amendments to the Model Law include new rules addressing the recognition and enforcement of interim measures of protection (articles 17H and 17I). The existence of these provisions only makes sense on the assumption that interim measures are *not* awards: if they were, they would be entitled to recognition and enforcement under the NYC and the new articles 17H and 17I would have been redundant.

Although the text of rules such as article 17A supports the idea that an interim measure issued in the form of an award is an award, this idea conflicts with the well-established principle that whether an arbitral decision is an award or not is a question of *substance* not of *title* or *form*. In the words of the leading French commentators: 'the characterization of a decision as an award … is determined *solely* by the nature of the decision itself.'[26]

As already seen, the substance-over-form principle is supported by *Resort Condominiums International Inc v Bolwell*[27] (in which it was held that, because the tribunal's 'Interim Arbitration Order and Award' lacked the characteristics of an award, it was not enforceable as an award under the NYC). The same approach was adopted by the Singapore Court of

[26] Savage & Gaillard (eds), *Fouchard, Gaillard & Goldman on International Commercial Arbitration* (1999) para 1352. Emphasis added. See also Peters & Koller, 'The Notion of Arbitral Award: An Attempt to Overcome a Babylonian Confusion' (2010) Austrian Yearbook on International Arbitration 137, 150-1.
[27] [1995] 1 Qd R 406, (1995) XX YB Comm Arb 628.

Appeal in *PT Asuransi Jasa Indonesia (Persero)v Dexia Bank SA*.[28] In a *dictum*, Chan Sek Keong CJ expressed the orthodox view that 'the mere titling of a document as an award does not make it an award … It is the substance and not the form that determines the true nature of the ruling of the tribunal.'[29]

The substance-over-form principle means that, just as a decision that does not have the characteristics of an award is not an award (even if referred to as an award by the tribunal), an arbitral decision that displays the objective characteristics of an award is an award (even though the tribunal attached a different label to it, such as an 'order' or 'ruling'). In the words of one commentator: 'failing to label an award as such does not alter its status'.[30]
In the *True North* case,[31] for example, the US courts decided that an 'order' rendered in the context of an English arbitration was entitled to enforcement in the United States under the NYC and, in the *Brasoil* case,[32] the Paris Court of Appeal annulled a decision described as a 'procedural order'. In both of these well-known cases, the court decided that the 'order' in question was properly to be classified as an award.[33]

[28] [2006] SGCA 41.
[29] At [70]. See also *Slocan Forest Products Ltd v Skeena Cellulose Inc* [2001] BCSC 1156, in which an evidential order, entitled 'Interim Award Number 3', was held not to be an award. Although the substance-over-form principle is generally accepted, some decisions effectively ignore it: in In *The Trade Fortitude* [1992] 1 Lloyd's Rep 169, the English High Court appears to have treated a procedural decision as an award (for the purposes of the Arbitration Act 1979) on the basis that the arbitrators 'had embodied their decision in a document which they describe[d] as an "Interim Final Award"' (at 175). The judge's conclusion on this point is not only unorthodox, but is also thinly reasoned and with little consideration of authority.
[30] Born, *International Commercial Arbitration* (2nd edn, 2014) p 2923
[31] *Publicis Communications v True North Communications Inc*, 206 F 3d 725 (7th Cir, 2000); discussed by Smit & Turner, 'Enforcement by US Courts of International Arbitration Interim Orders and Awards under the New York Convention' [2001:1] Stockholm Arbitration Report 47; Goldstein, (2000) 18 ASA Bull 830.
[32] *Braspetro Oil Services Co v Management and Implementation Authority of the Great Man-Made River Project* (*Brasoil v GMRA* (1999) XXIV YB Comm Arb 296.
[33] See also, eg, a German case in which it was held that a decision entitled an 'expert opinion' was in substance an award because it was final, binding, and enforceable: CLOUT case No 664 [Oberlandesgericht Stuttgart, Germany, 1 Sch 21/01, 23 January 2002] cited in UNCITRAL, *2012 Digest of Case Law on the Model Law on International Commercial Arbitration* (2012) p 127, para 4, n 576 (available at: http://www.uncitral.org/pdf/english/clout/MAL-digest-2012-e.pdf).

(4) Theoretical implications

In recent decades, there has been a debate about which legal order gives legitimacy and effectiveness to the dispute-resolution procedure known as international (commercial) arbitration. In very broad terms, there are three competing theories or representations;[34] international commercial arbitration may be conceived as being legitimated (i) by the legal order of the seat of arbitration (the territorial thesis) or (ii) by any legal order that is willing to recognise the effectiveness of the arbitral award (the Westphalian or pluralistic thesis) or (iii) by an autonomous arbitral order (the thesis of an autonomous arbitral legal order).[35]

The hallmark of the territorial thesis is that the legal order of the seat of arbitration confers legitimacy on the arbitral process. It would logically follow that, according to this model, the law of the seat determines which arbitral decisions are awards and which are not. It would also logically follow that it would be perfectly possible for an interim measure ordered in an arbitration seated in country A to be an award and for an identical measure ordered in an arbitration seated in country B not to be.

Although the territorial thesis has, to a large extent, gone out of fashion, there are some commentators whose work advocates a territorial view of international arbitration; van den Berg, for example, whose idea of international arbitration appears to have been influenced to a significant extent by the territorial thesis,[36] argues that, if an interim measure is classified as

[34] Gaillard, 'The Representation of International Arbitration' (2010) 2 Journal of International Dispute Settlement 1.
[35] See Gaillard, *Legal Theory of International Arbitration* (2010); Paulsson, 'Arbitration in Three Dimensions' (2011) 60 International and Comparative Law Quarterly 291.
[36]See, eg, van den Berg, 'Enforcement of Arbitral Awards Annulled in Russia' (2010) 27 Journal of International Arbitration 179; van den Berg, 'Enforcement of Arbitral Awards Annulled in Russia' (2011) 28 Journal of International Arbitration 617.

an award by the law of the seat, such a measure should be recognised as an award in other countries, thereby enabling it to be enforced internationally under the NYC.[37]

However, the sum of the materials considered in Section II are, by no means, consistent with the seat theory. Decisions such as the *True North* case[38] (in which the US courts treated an order issued in an English arbitration as an award and enforced it under the NYC) reflect a Westphalian model. In a similar vein, Ontario courts took the view that, in a case in which a foreign award has been the subject of a confirmatory judgment at the place of arbitration, whether the award remains enforceable in Ontario under the NYC, depends on whether the award merges into the judgment under the law of the forum, regardless of the award's status under the law of the seat.[39] The pluralistic model reflected by these cases is based on the notion that 'each State can make a decision regarding an award, irrespective of other States' decisions.'[40] This theory suggests that each country not only may decide whether or not to enforce an arbitral award, regardless of the stance taken by other countries, but also may decide what types of arbitral decisions qualify as awards.

As regards applications to set aside an award, the Westphalian model produces the same result as the seat theory: whether an arbitral decision is an award or not depends on the *lex arbitri* of the seat of arbitration. If, for example, an application is made to the Singapore courts to set aside an interim measure rendered by an arbitral tribunal in the context of an arbitration seated in Singapore, whether the measure may be set aside under article 34 of the

[37] Van den Berg, *The New York Arbitration Convention of 1958* (1981) p 44; van den Berg, 'The Application of the New York Convention by the Courts' in van den Berg (ed), *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention* (1999) 9 ICCA Congress Series 25, 29 ('an arbitral award providing for interim relief can be enforced under the Convention, provided that an arbitral decision providing for interim relief constitutes an arbitral award at the place of arbitration.').
[38] *Publicis Communications v True North Communications Inc*, 206 F 3d 725 (7th Cir, 2000).
[39] *Schreter v Gasmac Inc* [1992] OJ No 257 (Ontario Court, General Division).
[40] Gaillard, *Legal Theory of International Arbitration* (2010) p 28.

Model Law (as implemented into the law of Singapore) turns on whether an interim measure is classified as an award under Singapore law. If the court dismisses the application on the basis that an interim measure is not an award, one might be critical of Singapore law as being old-fashioned or, in policy terms, misguided, but one could hardly argue that, when determining whether the measure was or was not an award, the Singapore court should have applied anything other than Singapore law.

When it comes to the recognition and enforcement of awards under the NYC, the situation is less straightforward. In principle, there is a good argument for the view that, notwithstanding the fact that the NYC does not explicitly define 'award', what constitutes an award for the purposes of the NYC (and national legislation implementing the NYC) is a unitary concept, rather than a concept whose contours vary from one legal system to another. When cross-border enforcement is involved, an important element of the equation is the international nature of the enforcement regime established by the NYC. The idea that an 'award' under the NYC is a uniform concept is a natural corollary of the fact that the NYC creates an international regime for the enforcement of arbitral awards. It is, therefore, no surprise that there are commentators who, either explicitly or implicitly, support the notion that what constitutes an award for the purposes of the NYC is a single concept.[41]

This universalist view is also supported by some of the case law. In the *Resort Condominiums* case, for example, Lee J considered that various provisions of the NYC, in particular, articles II(1) and V(1)(c), implicitly limit the scope of the NYC's enforcement regime to arbitral decisions which 'determine[…] some or all of the issues submitted to the arbitrator for

[41] See, eg, di Pietro, 'What Constitutes an Arbitral Award under the New York Convention?' in Gaillard & di Pietro (eds), *Enforcement of Arbitration Agreements and International Arbitral Awards* (2008) 139; Peters & Koller, 'The Notion of Arbitral Award: An Attempt to Overcome a Babylonian Confusion' (2010) Austrian Yearbook on International Arbitration 137.

determination' and exclude 'interlocutory order[s].'[42] Whether or not Lee J's interpretation of the NYC is correct,[43] in methodological terms, his approach is to be supported. When determining the parameters of an international instrument such as the NYC, courts should try to fix those parameters by reference to the terms of the instrument itself (including its *travaux préparatoires*).[44] According to this approach, an 'award' for the purposes of recognition and enforcement under the NYC may well be different from the equivalent concept under the national law of either the seat of arbitration or the place of enforcement.[45]

In practice, however, it seems that, as regards enforcement under the NYC, the Westphalian model prevails to a significant extent. In the negotiations which led to the NYC, the Austrian delegate assumed that the definition of 'award' would depend on the *lex fori*.[46] More recently, the Working Party involved in the drafting of the 2006 amendments to the Model Law made a similar assumption.[47] This pluralistic view is also reflected in the case law. It has been noted that '[w]hether a decision by an arbitral tribunal constitutes an arbitral award is determined primarily on the basis of the law of the State where recognition and enforcement is sought.'[48] In the *True North* case,[49] for example, the court largely ignored the international

[42] (1995) XX YB Comm Arb 628 at [29]
[43] For criticism of the decision see, eg, Kojovic, 'Court Enforcement of Arbitral Decisions on Provisional Relief – How Final is Provisional?' (2001) 18 Journal of International Arbitration 511.
[44] It has been argued that the NYC's *travaux préparatoires* support the view that interim measures are not awards: see Goldstein, (2000) 18 ASA Bull 830, 833, referring to the Report and Preliminary Draft Convention adopted by the Committee on International Commercial Arbitration at its meeting of 13 March 1953; available at: http://www.newyorkconvention.org/travaux+preparatoires/history+1923+-+1958.
[45] Di Pietro, 'What Constitutes an Arbitral Award under the New York Convention?' in Gaillard & di Pietro (eds), *Enforcement of Arbitration Agreements and International Arbitral Awards* (2008) 139, 141-2.
[46] Paulsson, *The New York Convention in Action* (2016) p 114.
[47] See Holtzmann & Neuhaus *et al*, *A Guide to the 2006 Amendments to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (2015) p 169 ('It was said that the tribunal's characterization of the interim measure was not necessarily determinative of whether the measure was an "award" for the purposes of proceedings to set aside or enforce an interim measure, because the applicable law of the forum would define an "award".').
[48] UNCITRAL, *2012 Digest* of *Case Law on the Model Law on International Commercial Arbitration* (2012) p 169, para 12 (available at: http://www.uncitral.org/pdf/english/clout/MAL-digest-2012-e.pdf).
[49] *Publicis Communications v True North Communications Inc*, 206 F 3d 725 (7th Cir, 2000).

dimension and simply applied its domestic concept of 'award' in the context of an application to enforce under the NYC.

III The opinions of commentators

As noted above, the legal materials considered in Section II are consistent with the pluralistic theory and, in terms of positive law, any attempt to produce a definitive answer of universal validity to the question posed by the title of this article seems doomed to failure. The legislation and case law relating to international commercial arbitration is diffuse, contradictory and irreconcilable – with different legal systems defining what is meant by 'award' in different ways. Even whether an interim measure is enforceable as an award under the NYC 'remains an open question'[50] – with the international case law pointing in different directions.[51]

Accordingly, one might reasonably expect that commentators would acknowledge that whether an interim measure is an award depends on the precise circumstances in which the question is posed. Indeed, within the literature there is a multitude of works which either explicitly recognise that each legal system has its own national law of international arbitration[52] or place differences between legal systems at the forefront of the analysis.[53] The

[50] Paulsson & Petrochilos, *UNCITRAL Arbitration* (2017) p 302.
[51] See Kojovic, 'Court Enforcement of Arbitral Decisions on Provisional Relief – How Final is Provisional?' (2001) 18 Journal of International Arbitration 511, 520-7.
[52] See, eg, Backsmann, Carreteiro, Freitas de Souza *et al*, *International Arbitration in Brazil: An Introductory Practitioner's Guide* (2016); Berger & Kellerhais, *Domestic and International Arbitration in Switzerland* (2nd edn, 2010); Franke, Ragnwath *et al* (eds), *International Arbitration in Sweden: A Practitioner's Guide* (2013); Geisinger & Voser, *International Arbitration in Switzerland: A Handbook for Practitioners* (2nd edn, 2013); Hobér, *International Commercial Arbitration in Sweden* (2011); Kim, *International Arbitration in Korea* (2017); Carter & Felias (eds), *International Commercial Arbitration in New York* (2013); Nottage & Garnett (eds), *International Arbitration in Australia* (2010); Schwarz & Konrad, *The Vienna Rules: A Commentary on International Arbitration in Austria* (2009); Vermeulen, *International Commercial Arbitration in Belgium: A Paradigm of Delocalization through National Legislation* (1993).
[53] See, eg, Lew, Mistelis & Kröll, *Comparative International Commercial Arbitration* (2003); Poudret & Besson *Comparative Law of International Arbitration* (2007).

vast majority of the journal literature[54] also presupposes that, to a significant extent, different legal systems have separate regimes for the regulation of international arbitration. In the context of the current discussion, an interesting work is Marchisio's recent monograph entitled *The Notion of Award in International Commercial Arbitration: A Comparative Analysis of French Law, English Law, and the UNCITRAL Model Law*. One of the author's starting points is the hypothesis that, in terms of which arbitral decisions constitute awards, there are significant differences between French law, English law and the Model Law; his goal is to present 'a complex (and non-unitary) notion of arbitral award.'[55]

Nevertheless, the fundamentally pluralistic view of international arbitration (which answers the question forming the title of this article with 'it depends') reflects only one of the competing theories. The thesis of an autonomous arbitral legal order postulates that the arbitral legal order is a transnational legal order which, although based on national legal orders, rises above[56] (or exists alongside[57]) national legal systems. This theory implicitly suggests that the question under consideration should receive a unitary answer. Although the thesis of an autonomous arbitral legal order is impressive in terms of rhetoric and vision,[58] it involves some jurisprudential uncertainties; for example, it is not clear whether the arbitral legal order is conceived as a 'non-contradictory field of meaning'[59] (in a Kelsenian sense) nor exactly how it is possible to identify which norms are or are not part of this legal order. But, putting these jurisprudential questions to one side, it may be assumed that, in the context of

[54] In journals such as Arbitration International, the Journal of International Arbitration and the American Review of International Arbitration.
[55] Marchisio, *The Notion of Award in International Commercial Arbitration: A Comparative Analysis of French Law, English Law, and the UNCITRAL Model Law* (2017) p 12.
[56] Gaillard, *Legal Theory of International Arbitration* (2010) p 46.
[57] *Ibid*, p 60.
[58] See, eg, Lew, 'Achieving the Dream: Autonomous Arbitration' (2006) 22 Arbitration International 179, 181 ('International arbitration is a *sui juris* or autonomous dispute resolution process, governed primarily by non-national rules and accepted international commercial rules and practices.').
[59] Harris, 'When and Why Does the Grundnorm Change?' [1971] CLJ 103, 106; Harris, *Law and Legal Science* (1979) p 24.

the arbitral legal order, the term 'award' always has the same significance. Any other solution would mean that, in the phrase 'autonomous arbitral legal order', the term 'legal order' was being used to signify something very different from its normal meaning.

It would be fair to say that most commentators do not explicitly nail their colours to the mast of one theory of international arbitration or another and it is not uncommon to find traces of different theories in the work of a single author. Nevertheless, it is plausible to suggest that those authors who seek to provide a single answer to the question 'is an interim measure an arbitral award?' are, consciously or unconsciously, relying, to some extent, on the thesis of the autonomous arbitral legal order.

Although in his monograph, Marchisio's methodology is basically comparative in nature, the author seems also to take the view that, sitting alongside (or above?) national systems of arbitration law, there exists a discrete law of international arbitration. Marchisio states in his introductory chapter, first, that 'the notion of arbitral award *in international arbitration* will be compared with the equivalent notions found in … French and English laws'[60] and, secondly, that it is important that the question 'what is an arbitral award?' should be given a 'single answer'.[61]

A similar approach can be found in Gary Born's *International Commercial Arbitration*.[62] Born analyses and seeks to integrate materials from a wide range of different jurisdictions without considering *in a systematic way* the variations between jurisdictions. Although,

[60] *Ibid*, p 7. Emphasis added.
[61] *Ibid*, p 61. In his concluding chapter, Marchisio (*Ibid*, p 180) offers a suggestion as to what that answer might be: 'An award is a decision rendered following a judicial-like procedure, which either establishes the jurisdictional boundaries of the tribunal, or leads to a resolution of a dispute or prevents the frustration of the arbitral proceedings.'
[62] (2nd edn, 2014).

throughout his exhaustive treatise, Born discusses different solutions to common problems offered by different systems of arbitration law, the ultimate aim of his work is to describe and develop 'a common corpus of international arbitration law which has global application and importance'[63] or, in the words of one reviewer, 'a global common law of international commercial arbitration'.[64] Within this 'common corpus', the premise must be that an award is a single concept.

How, then, do such commentators answer the question whether an interim measure is an arbitral award? Perhaps, unsurprisingly, there is a lack of consensus – with two diametrically opposed views. One the one hand, there is a solid body of academic opinion which rejects the idea that an interim measure can be an award.[65] This view is largely based on the frequently made assertion that one of the key characteristics of an award is its finality; an award is binding on the parties and the tribunal and has *res judicata* effect.[66] In the words of one commentator: 'an award must finally decide an issue. It is necessary to establish whether the award really is an "award," that is, a final decision by an arbitration tribunal on a particular issue.'[67] If finality is, indeed, a key characteristic of an award[68] and finality is to be

[63] *International Commercial Arbitration* (2nd edn, 2014) p 4.
[64] Walsh, (2015) 31 Arbitration International 533.
[65] See, eg, Lew, Mistelis & Kröll. *Comparative International Commercial Arbitration* (2003) para 24-28; Pryles, 'Interlocutory Orders and Convention Awards: the Case of *Resort Condominiums* v *Bolwell*' (1994) 10 Arbitration International 385; Donovan, 'The Scope and Enforceability of Provisional Measures in International Commercial Arbitration A Survey of Jurisdictions, the Work of UNCITRAL and Proposals For Moving Forward' in van den Berg (ed), *International Commercial Arbitration: Important Contemporary Questions* (2003) 11 ICCA Congress Series 82, 133.
[66] Among the leading texts in the field, see: Lew, Mistelis & Kröll, *Comparative International Commercial Arbitration* (2003) para 24-12 ('Any decision which finally resolves a substantive issue affecting the rights and obligations of the parties is an award.'); Redfern & Hunter, *Law and Practice of International Arbitration* (6th edn, 2015) para 9.08 ('The term 'award' should generally be reserved for decisions that finally determine the substantive issues with which they deal.'); Savage & Gaillard (eds), *Fouchard, Gaillard & Goldman on International Commercial Arbitration* (1999) para 1353 ('An arbitral award can be defined as a final decision by the arbitrators on all or part of the dispute submitted to them').
[67] Otto, 'Article IV' in Kronke, Nacimiento *et al* (eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (2010) p 150.
[68] The finality of arbitral awards is frequently emphasised by national arbitration legislation – see, eg, Arbitration Act 1996 (England), s 58 ('an award made by the tribunal pursuant to an arbitration agreement is final and binding') – and sets of arbitration rules – see, eg, art 26(9) of the LCIA rules ('Every award … shall be final and binding on the parties.'); art 43(8) of the CIETAC Arbitration Rules ('The arbitral award is final and

understood in its traditional sense (of being definitive and not liable to be re-opened or revised), an interim measure, which is temporary and always liable to be altered, cannot be an award.

On the other hand, several commentators maintain that interim measures of protection should be classified as awards. Perhaps the leading exponent of this view is Born who considers that 'provisional measures … are enforceable as arbitral awards';[69] he argues that:

> interlocutory decisions by the arbitrators on disputed issues should generally be regarded as awards, under both the New York Convention and arbitration legislation, provided they finally dispose of a request for relief by one of the parties through an application of legal rules to a factual record. This conclusion applies, for example, to arbitral decisions on requests for provisional measures, stays of arbitral proceedings and disclosure.[70]

This level of disagreement between commentators[71] should be a cause neither of surprise nor of particular concern – for several reasons. First, it is inherently likely that the combined effect of the somewhat chaotic state of the law analysed in Section II and the existence of different theories of international commercial arbitration would lead different commentators to draw different conclusions. The diversity of legal materials enables commentators to adopt

binding upon both parties.'); art 34(2) of the UNCITAL Arbitration Rules ('All awards … shall be final and binding on the parties.').

[69] *International Commercial Arbitration* (2nd edn, 2014) p 2515.

[70] Born, *International Arbitration: Law and Practice* (2nd edn, 2015) ch 15, para 12. See also Yesilirmak, *Provisional Measures in International Commercial Arbitration* (2005) para 5-54.

[71] Although some commentators assert that there is a consensus about whether interim measures are awards, they fail to agree on what that consensus is. Compare, eg, Demirkol, 'Ordering cessation of court proceedings to protect the integrity of arbitration agreements under the Brussels I regime'(2016) 65 ICLQ 379, 391 ('it is generally accepted that interim awards ordering provisional measures are enforceable under the New York Convention') with Otto, 'Article IV' in Kronke, Nacimiento *et al* (eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (2010) p 157 ('there is a consensus that the New York Convention does not address nor cover the enforcement of interim measures').

different theoretical starting points and to emphasise one strand of authority in preference to others.

Secondly, in the context of discussions of the law of international arbitration (as opposed to the law of a specific country), the dividing line between *lex lata* and *lex ferenda* (or between law and policy) is even more blurred than usual. If one accepts that different national regimes for the regulation of international arbitration provide different answers to particular arbitration-related questions and that there also exists an autonomous arbitral legal order or, perhaps more prosaically, a transnational law of international arbitration, identification of the norms which make up the arbitral legal order (or the law of international arbitration) necessarily requires choices to be made. In his account of the arbitral legal order, Gaillard distinguishes between 'rules that are widely recognised' (which *ex hypothesi* are part of the arbitral legal order), on the one hand, and those which are 'idiosyncratic or outdated' (which are not), on the other;[72] throughout Born's treatise, in situations where national laws diverge, the author refers to 'better-reasoned national court decisions' or 'better-reasoned authority' and identifies what he regards to be 'the better analysis', 'the better interpretation', 'the better reading' or 'the better view' (which presumably presents the relevant rule for the purposes of the 'common body of international arbitration law'[73]).

Many commentators who seek to provide a 'single answer' to the question whether an interim measure is (or can be) an award end up reaching conclusions about what they think the law *ought to be*, rather than what it *is*. For example, in his discussion of the notion of an award for the purposes of the NYC, di Pietro refers to the standard materials and concludes *inter alia*

[72] Gaillard, *Legal Theory of International Arbitration* (2010) p 48.
[73] *Ibid*, p 4.

that 'awards that settle issues such as the applicable law …. *should be* considered as awards enforceable under the Convention'[74] and that '[t]he enforceability of interim measures under the convention *should ... be* dismissed out of hand.'[75] By contrast, Born considers essentially the same range of materials but concludes that 'the better view is that provisional measures *should be* and *are* enforceable as arbitral awards under generally-applicable provisions for the recognition and enforcement of awards in the Convention and most national arbitration regimes.'[76] It is unclear whether these authors disagree profoundly about how the legal sources under discussion should be interpreted or whether their disagreement is essentially about the policy that the law should follow. Given the diversity of positions adopted in the legal materials, any commentator who seeks to provide a 'single answer' to the question whether an interim measure is an award is almost bound to write in terms of *lex ferenda*, rather than *lex lata*.[77]

Thirdly, lack of consensus among commentators can be seen partly as a result of the fact that the concept of an award is evolving, rather than static. Traditionally, an award has been defined as a final decision which definitively resolves the merits of the dispute which the parties referred to arbitration (or an element of that dispute). Marchisio refers to this as the 'monodimensional model' according to which the paradigm is the *contentious* award.[78] However, the law rarely stands still and Marchisio's thesis is that the world of international commercial arbitration is evolving from the monodimensional model and towards a

[74] Di Pietro, 'What Constitutes an Arbitral Award under the New York Convention?' in Gaillard & di Pietro (eds), *Enforcement of Arbitration Agreements and International Arbitral Awards* (2008) 139, 150. Emphasis added.
[75] *Ibid*, at 156. Emphasis added.
[76] *International Commercial Arbitration* (2nd edn, 2014) p 2515. Emphasis added.
[77] In addition, some commentators reject the traditional, criteria-based method for distinguishing awards from other types of arbitral decision. For these authors, who adopt a policy-based approach, the relevant question is not 'is this decision an award?', but '*should* this decision be an award?': see Kirby, 'What Is an Award, Anyway?' (2014) 31 Journal of International Arbitration 475, 478.
[78] *The Notion of Award in International Commercial Arbitration: A Comparative Analysis of French Law, English Law, and the UNCITRAL Model Law* (2017) pp 14-15.

'multidimensional model' which recognises that arbitral tribunals have a range of significant decision-making powers and that the exercise of each of these key powers produces an award – ie, a decision which, *prima facie*, is entitled to international recognition and enforcement under the NYC.

According to Marchisio's analysis, this multidimensional model treats contentious decisions, jurisdictional decisions, decisions by consent, and decisions *ante causam* (including interim measures) as awards. Marchisio's aim is to 'show the existence of a trend favouring the expansion of the notion of award, with a view to guaranteeing a uniform and wide enforcement of important arbitral decisions.'[79] But, a 'trend' falls a long way short of a uniform and universal development. If Marchisio's thesis is correct, it can hardly come as a surprise that an interim measure is regarded as an award by some legal systems (like the United States) and not by others (such as France and Switzerland). Or that commentators from different countries have different perceptions of the notion of an arbitral award. Lack of consensus surrounding the question whether an interim measure is an award is, in part, a consequence of the fact that the process of evolution suggested by Marchisio is occurring in different jurisdictions at different rates.

IV Conclusion: should an interim measure of protection ordered by an arbitral tribunal be an arbitral award?

That still leaves to be answered the question whether an interim measure *should be* an award. As noted above, the main consequences of an arbitral decision being classified as an award are twofold: first, an award is subject to review by the supervisory court and may be set aside in accordance with the *lex arbitri* (ie, the law of the seat); secondly, an award is enforceable

[79] *Ibid*, p 49.

through the courts either at the seat of arbitration under the law of the seat or in another country under the NYC. To a large extent, enforcement and setting aside can be seen as two sides of the same coin.

Most commentators seem to see the policy arguments pointing in one direction only (in favour of treating interim measures of protection as awards so that they can be enforced as such under the NYC[80]). Born, for example, suggests that '[i]t is … highly important to the efficacy of the arbitral process for national courts to be able to enforce provisional measures' and that 'there is no sound policy reason for withholding judicial enforcement mechanisms for tribunal-ordered provisional measures.'[81] The US case law also focuses on this policy dimension; in *Pacific Reinsurance Management Corporation v Ohio Reinsurance Corporation*,[82] for example, the court reasoned that:

> Given the potential importance of temporary equitable awards in making the arbitration proceedings meaningful, court enforcement of them, when appropriate, is not an 'undue intrusion upon the arbitral process' … but is essential to preserve the integrity of process.[83]

There are, however, three strands that cast doubt on the cogency of the policy argument in favour of treating interim measures as awards.

First, the practical imperative of classifying interim measures as awards may be questioned. It has been observed that '[i]n practice, the enforceability of interim measures may not be quite so important as it might at first sight appear. This is because most parties voluntarily comply

[80] See, eg, Marchisio, *The Notion of Award in International Commercial Arbitration: A Comparative Analysis of French Law, English Law, and the UNCITRAL Model Law* (2017) p 20.
[81] *International Commercial Arbitration* (2nd edn, 2014) p 2515.
[82] 935 F 2d 1019 (9th Cir, 1991).
[83] At 1023 (citation omitted).

with interim measures orders granted by arbitral tribunals.'[84] This view is supported by the absence of judicial decisions ruling on applications to enforce interim measures ordered by arbitrators. If the enforcement of interim measures outside the seat of arbitration is, in practical terms, of vital significance, one might reasonably expect there to be a significant body of case law addressing the enforceability of interim measures under the NYC. However, the only well-known decision which fits this fact-pattern is the *Resort Condominiums* case,[85] which dates from the mid-1990s. The fact that *Resort Condominiums* appears not to be the first in a line of similar decisions, suggests that the enforcement of interim measures under the NYC is less crucial than is sometimes asserted.

Secondly, notwithstanding suggestions to the contrary, there is a significant policy argument against treating interim measures as awards. If an arbitral decision is an award, a disappointed party may apply to the courts of the seat to have it set aside; the wider the range of decisions that are classified as awards, the more opportunities there are for dissatisfied parties to encourage the courts of the seat to review the tribunal's decision-making.[86]

Inforica Inc v CGI Information Systems & Management Consultants Inc,[87] a decision of the Ontario Court of Appeal, involved an application to set aside an arbitral decision ordering one of the parties to provide security for costs. Sharpe JA decided that the contested interim measure was not an award and rejected the argument that there would be a gap in the law if this sort of order were not subject to judicial scrutiny through the setting-aside process:

[84] Grierson & van Hooft, *Arbitrating under the 2012 ICC Rules* (2012) p 162. See also Scherer, Richman *et al*, *Arbitrating under the 2014 LCIA Rules: A User's Guide*, (2015) ch 17, para 60 ('In practice, most Tribunals' decisions on interim measures are complied with voluntarily and therefore the need to enforce these measures arises only rarely.').
[85] [1995] 1 Qd R 406, (1995) XX YB Comm Arb 628.
[86] See, eg, *British Insurance Co. of Cayman v Water Street Insurance Co*, 93 F Supp 2d 506 (SDNY, 2000) (setting aside refused on the facts).
[87] [2009] ONCA 642.

> A significant feature of the modern approach limiting access to the courts to review decisions of arbitrators is that there are no appeals from procedural or interlocutory orders. … This is a deliberate policy, "not a lacuna in our law", to protect the autonomy of the arbitral process. The creation of a power by the courts to intervene on interlocutory rulings by arbitrators "would constitute a most serious reproach to the ability of our system of arbitration to serve the needs of users of the arbitral process".[88]

As this case illustrates, the classification of an arbitral decision as an award is a something of a double-edged sword. Although, on the one hand, it opens the door to enforcement, not only at the seat of arbitration but also in other countries under the NYC, on the other hand, it also gives the courts of the seat a power to interfere in the arbitral process.

If interim measures are exposed to the possibility of being set aside by the courts of the seat of arbitration, the autonomy of arbitration as a dispute-resolution mechanism is undermined. Accordingly, in policy terms, the most 'arbitration-friendly' solution is not to treat interim measures as awards, but to make provision for the enforcement of interim measures *as interim measures*, thereby enabling enforcement without creating the possibility of annulment.[89]

Thirdly, the 'arbitration-friendly' solution suggested in the previous paragraph is provided by articles 17H and 17I of the 2006 version of the Model Law (and national legislation which

[88] At [18] (citations omitted). Although the basic principle advanced by Sharpe JA is also recognised by courts of the United States (see, eg, *Michaels v Mariforum Shipping SA*, 624 F 2d 411 (2d Cir, 1980), US courts, as noted above, treat an interim measure as an award if it 'finally and definitely dispose[s] of a discrete and independent claim': *Ecopetrol SA v Offshore Exploration & Production LLC*, 46 F Supp 3d 327, 339 (SDNY, 2014).

[89] *Cf* Marchisio, *The Notion of Award in International Commercial Arbitration: A Comparative Analysis of French Law, English Law, and the UNCITRAL Model Law* (2017) p 178.

follows the revised Model Law). Under the New Zealand legislation, for example, an 'award' is defined as 'a decision of the arbitral tribunal on the substance of the dispute'.[90] As a result, interim measures ordered in arbitrations seated in New Zealand cannot be challenged by means of an application for setting aside. However, section 17L(1) of Arbitration Act 1996 (introduced by the Arbitration Amendment Act 2007) provides:

> An interim measure granted by an arbitral tribunal must be recognised as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent Court, *irrespective of the country in which it was granted*.[91]

This legislative solution addresses, on the one hand, not only the concerns of commentators such as Born who argue for interim measures to be treated as awards so that they may be enforced internationally, but also, on the other, the disquiet expressed by Sharpe JA in the *Inforica* case[92] about excessive judicial interference in the arbitral process.

New Zealand's legislative solution shows that the question whether an interim measure is (or can be) an award becomes something of a side-issue if provision is made for the enforcement of interim measures *as interim measures*. The policy argument for treating interim measures as awards is all about promoting their enforceability; but, the Model Law (and national legislation which follows the Model Law) shows that interim measures can be made enforceable without treating them as awards, thereby protecting them against the possibility of being set aside and better preserving the autonomy of the arbitral process.

[90] Arbitration Act 2006, s 2.
[91] Emphasis added.
[92] *Inforica Inc v CGI Information Systems & Management Consultants Inc* [2009] ONCA 642.